UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- v. -

16 Cr. 746 (PKC)

DAVID BERGSTEIN, and
KEITH WELLNER,

Defendants.

- x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DAVID BERGSTEIN'S MOTION TO QUASH SUBPOENA

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The Government hereby submits this memorandum of law in opposition to defendant David Bergstein's motion to quash the subpoena, issued on July 1, 2017, to Alex Weingarten seeking "all recordings produced by Paul Parmar in litigation" (the "Subpoena"). Bergstein's motion should be denied because he fails to show that the Subpoena was issued for the sole or dominating purpose of preparing for trial. To the contrary, the Subpoena was issued in connection with an active grand jury investigation relating to criminal conduct not charged in the Indictment.

Moreover, the recordings required to be produced under the Subpoena plainly do not constitute attorney "work product." In addition, Bergstein has neither standing, nor a legal basis, to challenge the Subpoena on the basis of California ethics rules. For all of these reasons, Bergstein's motion should be denied.

BACKGROUND

On November 9, 2016, Indictment 16 Cr. 746 (PKC) (the "Indictment") was unsealed, charging Bergstein and co-defendant Keith Wellner with conspiracy to commit investment advisor fraud and securities fraud, in violation of Title 18, United States Code, Section 371 (Count One); investment advisor fraud, in violation of Title 15, United States Code, Sections 80b-6 and 80b-17

(Counts Two and Three); securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5 (Counts Four and Five); and conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1349 (Count Six). Bergstein is also charged with wire fraud, in violation of Title 18, United States Code, Section 1343 (Count Seven). Trial is scheduled to begin on February 8, 2018.

In or about December 2016 and early 2017, the Government learned through representations made by Bergstein's counsel that an individual named Paul Parmar had made numerous recordings of conversations with Bergstein, which Bergstein had obtained in a separate civil litigation.[1] Bergstein's counsel represented that certain recordings were related to Bergstein's dealings with Weston and/or Parmar and took place at least in or about 2011 through 2012. Bergstein further claimed to the Government that certain of the recordings tended to incriminate Parmar. The Government is not in possession of the recordings that Bergstein's counsel described to the Government.

During the February 2, 2017 pretrial conference, Bergstein represented to the Court through his counsel that he was "aware from related civil actions, that there are hundreds of hours of recordings by Mr. Parmar." (Tr. at 6). The Government requested those recordings pursuant to Rule 16, but Bergstein declined to provide them. Bergstein also sought an order compelling the Government to turn over all recordings in Parmar's possession. As the Government explained during the May 4, 2017 pretrial conference, the Government was and is in possession of only eleven recordings made by Parmar that relate to the subject matter of this case. All of those recordings have been provided to the defense. The Government does not presently intend to call Parmar as a witness at trial or introduce any recordings or statements by Parmar.

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[1] Parmar was an associate of Bergstein who Bergstein represented would be involved in operating Arius Libra, Inc., a medical billing business that Bergstein used to further the fraudulent scheme alleged in the Indictment. Parmar and another individual, identified in the Indictment as CC-1, were also among several individuals and entities to whom Bergstein transferred certain proceeds of the fraud scheme. Neither Parmar nor CC-1 have been charged in connection with the scheme alleged in the Indictment at this time.

On or about May 24, 2017, the Government learned from Alex Weingarten, an attorney who had previously represented Bergstein in a separate civil litigation, that Weingarten was in possession of approximately 1400 audio recordings made by Parmar. Weingarten had received these recordings during the course of a separate civil litigation in California.

On July 1, 2017, the Government issued the Subpoena to Weingarten seeking "all recordings produced by Paul Parmar in litigation." The Subpoena lists, as offenses under investigation by the grand jury, securities fraud, wire fraud, identity theft, money laundering, and conspiracy. The Subpoena was issued primarily for the purpose of furthering the ongoing investigation into conduct and individuals not charged in the Indictment.[2]

DISCUSSION

A. Applicable Law

1. Proper Use of the Grand Jury After an Indictment is Returned

"A grand jury's investigative power does not end when it indicts a defendant. Instead, 'post-indictment action is permitted to identify or investigate other individuals involved in criminal schemes or to prepare superseding indictments against persons already charged.'" *United States* v. *Meregildo*, 876 F. Supp. 2d 445, 448-449 (S.D.N.Y. July 6, 2012) (quoting *United States* v.

[2] Additional information regarding the investigation is contained in a letter to the Court which is being filed *ex parte* and under seal as it pertains to an ongoing grand jury investigation.

Jones, 129 F.3d 718, 723 (2d Cir. 1997)) (internal citations omitted). While it is "improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial," *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985* (*Robert M. Simels Esq.*), ("*Simels*") 767 F.2d 26, 29 (2d Cir. 1985), "where the grand jury investigation is not primarily motivated by this improper purpose, evidence obtained pursuant to the investigation may be offered at the trial on the initial charges." *United States* v. *Leung*, 40 F.3d 577, 581 (2d Cir. 1994).

"Because a presumption of regularity attaches to grand jury proceedings, a defendant seeking to exclude evidence obtained by a post-indictment grand jury subpoena has the burden of showing that the Government's use of the grand jury was improperly motivated." *United States* v. *Bin Laden*, 116 F. Supp. 2d 489, 492 (S.D.N.Y. Oct. 5, 2000) (quoting *United States v. Leung*, 40 F.3d at 581); *United States v. Punn*, 737 F.3d 1, 6 (2d Cir. 2013) ("The defendant has the burden of proving that the grand jury subpoenas were issued for an improper purpose, as the subpoenas are otherwise presumed to have a proper purpose."); *United States* v. *Sasso*, 59 F.3d 341, 352 (2d Cir. 1995) ("There is a presumption that [a post-indictment] subpoena had a proper purpose."); *United States* v. *Raphael*, 786 F. Supp. 355, 358 (S.D.N.Y. 1992). "To satisfy this burden, the defendant 'must present particularized proof of an improper purpose.'" *Punn*, 737 F.3d at 6 (citing *United States* v. *Salameh*, 152 F.3d 88, 109 (2d Cir. 1998)).

"[A]bsent some indicative sequence of events demonstrating an irregularity, a court has to take at face value the Government's word that the dominant purpose of the Grand Jury proceedings is proper." *United States* v. *Ohle*, 678 F. Supp. 2d 215, 233 (S.D.N.Y. 2010) (quoting *United States* v. *Raphael* 786 F. Supp. at 358); *United States* v. *Meregildo*, 876 F. Supp. 2d 445 (denying motion to quash grand jury subpoena and distinguishing *Simels* because the Government had "represented repeatedly that grand jury investigations into Defendants' alleged violent activity are ongoing").

For these reasons, courts in this District regularly deny motions to quash grand jury subpoenas on the basis that they were issued with an improper purpose. *See, e.g.*, *Salameh*, 152 F.3d at 109; *Meregildo*, 876 F. Supp. 2d at 449; *Bin Laden*, 116 F. Supp. 2d 489, at 493; *United States* v. *Blech*, 208 F.R.D. 65, 68 (S.D.N.Y. 2002); *In re Grand Jury Subpoena Duces Tecum*, 741 F. Supp. 1059 (S.D.N.Y. 1990).

2. Attorney Work Product Doctrine

The work-product privilege protects "work product of the lawyer" by prohibiting "unwarranted inquiries into the files and the mental impressions of an attorney." *In re Grand Jury Subpoenas*, 959 F.2d 1158, 1166 (2d Cir. 1992) (quoting *Hickman* v. *Taylor*, 329 U.S. 495, 510-11 (1947). The purpose of the attorney work product doctrine is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *United States* v. *Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman* v. *Taylor*, 329 U.S. at 510); *see also United States* v. *Nobles*, 422 U.S. 225, 238 (1975) (noting that work product doctrine applies in criminal cases but finding that the defendant had waived the privilege).

It is black letter law that "[t]he attorney-work-product doctrine generally does not shield from discovery documents that were not prepared by the attorneys themselves, or their agents, in the course of or in anticipation of litigation." *In re Grand Jury Subpoenas*, 959 F.2d 1158, 1166 (2d Cir. 1992) (rejecting work product claim with respect to telephone company records in possession of former attorneys of criminal target) (citing *United States* v. *Nobles*, 422 U.S. at 238-39 & n.13); *Mercator Corp.* v. *United States (In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002*), 318 F.3d 379, 384 (2d Cir. 2002) ("*Mercator*") ("As we previously have made plain, and as Judge Chin correctly recognized, the principle underlying the work product doctrine – sheltering the mental processes of an attorney as reflected in documents prepared for litigation – is not generally promoted by shielding from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents."); *In re Grand Jury Subpoenas Dated March 19 & Aug. 2, 2002*, 2002 U.S. Dist. LEXIS 17079, at *16-17 (S.D.N.Y. Sept. 11, 2002) ("The mere acquisition of documents from an unrelated third-party does not by itself impose upon them the status of work product.").[3]

Absent a privilege, a party generally lacks standing to challenge a subpoena issued to a third party. *See, e.g., United States v. Nachamie*, 91 F. Supp. 2d 552, 558 (S.D.N.Y. Jan. 6, 2000) ("A party generally lacks standing to challenge a subpoena issued to a third party absent a claim of privilege or a proprietary interest in the subpoenaed matter."). *See also United States v. Reyes*, 162 F.R.D. 468, 470 (S.D.N.Y. 1995)(citing *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121 (2d Cir. 1975) (absent claim of privilege, party usually has no standing to object to subpoena directed at non-party); *In re Grand Jury Subpoena Duces Tecum, May 9, 1990*, 741 F. Supp. 1059,

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[3] There is a narrow exception to this rule, not applicable in this case, "where a request is made for documents already in the possession of the requesting party, with the precise goal of learning what the opposing attorney's thinking or strategy may be." *In re Grand Jury Subpoenas*, 959 F.2d at 1166. *See, e.g., Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (holding that the work product doctrine applied to a folder of documents defense counsel had "culled" from hundreds of thousands of documents to use in preparing a witness for a deposition; "[I]n selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case.").

1060 n.1 (S.D.N.Y. 1990)(same), aff'd, 956 F.2d 1160 (2d Cir. 1992); *Ponsford v. United States*, 771 F.2d 1305, 1308 (9th Cir. 1985) (absent proprietary interest in documents sought, no standing to quash)).

B. Discussion

Bergstein's motion should be denied because he cannot meet his "burden of showing that the Government's use of the grand jury was improperly motivated." *Bin Laden*, 116 F. Supp. 2d at 492 (quoting *Leung*, 40 F.3d at 581); *see also United States* v. *Sasso*, 59 F.3d at 352 ("There is a presumption that [a post-indictment] subpoena had a proper purpose."). Simply put, the Subpoena was issued in connection with an ongoing investigation into conduct and individuals not charged in the Indictment, and it does not seek privileged materials. *Meregildo*, 876 F. Supp. 2d 445 (denying motion to quash grand jury subpoena on the basis that the Government had "represented repeatedly that grand jury investigations into Defendants' alleged violent activity are ongoing"). Although the Subpoena may result in the production of materials relevant to this matter, its importance to ongoing investigations is explained in the Government's *ex parte* letter to the Court submitted in connection with this memorandum. Bergstein's motion should accordingly be denied.

1. The Subpoena Was Properly Issued

The Subpoena was properly issued pursuant to an ongoing grand jury investigation, and the fact that there may be overlap with this case provides no basis to quash it. This case is thus far different from *Simels*, on which Bergstein primarily relies. In *Simels*, the Government issued a trial subpoena to the defendant's criminal attorney, who was representing him on pending charges. *Simels*, 767 F.2d at 27-30. The trial subpoena sought, among other things, information relating to the defendant's payments to his attorney. The Government represented to the Court that the subpoena was "solely for evidentiary purposes" and was issued to obtain evidence that could be used at trial to prove an "element" of the charged crime. *Id.* at 29. The recipient of the subpoena and others objected to its issuance. In response, the Government withdrew the subpoena and replaced it with a grand jury subpoena seeking the same materials. *Id.* at 28.

The facts in this case stand in stark contrast to those in *Simels*. Here, the Government never issued a trial subpoena for the Parmar recordings and, contrary to *Simels*, the Government in this case has never represented that the materials are sought "solely for evidentiary purposes" to prove an element of the charged crime at trial. In fact, the opposite is true. While the Subpoena may lead to the production of materials relevant to the charged conduct which might be used by either party at trial, the grand jury has an ongoing investigation into individuals and conduct beyond that charged in the Indictment. As the *ex parte* submission makes clear, the grand jury requires the materials sought in the Subpoena in order to proceed with its investigation and to make any ultimate determination as to criminal wrongdoing.

Nor is there anything suspicious about the timing here. The Government requested recordings from Bergstein's counsel months ago and it is still more than six months before trial. As the *ex parte* submission demonstrates, the separate grand jury investigation into other actors and other conduct has been proceeding in parallel fashion for some time. In these circumstances, the presumption of regularity, strengthened by the Government's detailed proffer regarding the active grand jury investigation, demonstrate "that the dominant purpose of the Grand Jury proceedings is proper." *Ohle*, 678 F. Supp. 2d at 233; *Raphael* 786 F. Supp. at 358.[4]

2. Bergstein's Work-Product Claim is Meritless

Bergstein next claims that the Subpoena seeks attorney work-product and would be oppressive as to its recipient (who, it should be noted, has not himself moved to intervene in this action or quash the Subpoena). To begin, there is simply no merit to Bergstein's assertion that the Parmar recordings in Weingarten's possession are protected by the work-product doctrine. It is well-established that "[t]he attorney-work-product doctrine generally does not shield from discovery documents that were not prepared by the attorneys themselves, or their agents, in the course of or in anticipation of litigation." *In re Grand Jury Subpoenas*, 959 F.2d at 1166. Critically, "the mere acquisition of documents from an unrelated third-party does not by itself impose upon them the status of work product." *In re Grand Jury Subpoenas Dated March 19 & Aug. 2, 2002*, 2002 U.S. Dist. LEXIS 17079, at *16-17 (S.D.N.Y. Sept. 11, 2002). That is, documents not prepared by a lawyer do not magically become work product simply because a lawyer received them in discovery (as here).

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[4] Notably, the Government could have, but chose not to, seek a Rule 17(c) subpoena directed to Weingarten for the recordings. In light of Bergstein's repeated assertions about the relevance and admissibility of the recordings, Bergstein would hardly have a basis to challenge such a subpoena. *See, e.g.*, Def. Br. at 2 (characterizing Parmar as the "central figure" in the transactions charged in the Indictment and the recordings made by Parmar as "key evidence in the case"); Defendant's Memorandum of Law in Support of Motion to Compel (dkt # 70) ¶ 8 (stating that the Parmar recordings "are directly relevant to this case and concern the subject matter of the Indictment"). That the Government chose to seek these materials via a grand jury subpoena is further evidence that the primary purpose for seeking the materials is for the ongoing grand jury investigation.

Here, the Parmar recordings were not prepared by Weingarten or any of his agents. They were made by Parmar and turned over to Weingarten in discovery in a separate civil case. Nothing in that undifferentiated collection of recordings reflects the "mental processes of an attorney as reflected in documents prepared for litigation," *Mercator*, 318 F.3d at 384, which is what the attorney work product doctrine was designed to protect.

Moreover, Bergstein has neither standing, nor a basis in law, to assert that Weingarten may resist compliance with the Subpoena on the basis of the California Rules of Professional Conduct. First, as discussed above, the material sought by the Subpoena is neither attorney work product nor otherwise "confidential." It is simply material obtained from another party in the course of litigation. Second, because the work-product doctrine does not apply to the subpoenaed material, Bergstein has no standing to challenge the subpoena on the basis of how state ethical rules may apply to his prior civil attorney. *See, e.g., Nachamie*, 91 F. Supp. 2d 552 at 558 ("A party generally lacks standing to challenge a subpoena issued to a third party absent a claim of privilege or a proprietary interest in the subpoenaed matter."). Third, under the Supremacy Clause, state ethics rules – even if they applied and even if Bergstein had standing to raise them – are not a basis to challenge the enforcement of a federal grand jury subpoena. *See, e.g., United States* v. *Silverman*, 745 F.2d 1386, 1398 (11th Cir. 1984) (denying defendant's challenge to a subpoena on the basis that "the complaints it sought were confidential under the rules of The Florida Bar" because "the district court was bound . . . by rule 501's proscription of state law privileges in criminal cases") (citing *United States* v. *Gillock*, 445 U.S. 360, 369 (1980).)

CONCLUSION

For the foregoing reasons, Bergstein's motion to quash the Subpoena should be denied.

Dated: July 17, 2017
New York, New York

Respectfully submitted,

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AFFIRMATION OF SERVICE

I, Elisha J. Kobre, pursuant to Title 28, United States Code, Section 1746, hereby declares under the penalty of perjury that:

I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York.

On July 17, 2017, I caused a copy of this Memorandum of Law in Opposition to Defendant David Bergstein's Motion to Quash the Grand Jury Subpoena to be served on counsel for David Bergstein via ECF.

Dated: July 17, 2017
New York, New York

Respectfully submitted,

/s/ Elisha J.Kobre
Elisha J. Kobre
Assistant United States Attorney